# No. 16367

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al, *Respondents*

## APPELLANTS' MEMORANDUM IN RESPONSE TO PETITIONS FOR REHEARING

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## APPELLANTS' MEMORANDUM IN RESPONSE TO PETITIONS FOR REHEARING

In response to the order of the Court of January 16, and the several petitions for rehearing, appellants submit the following memorandum:

I. ***The prior decisions of this court do not justify any of the petitions for rehearing.***

Throughout its entire petition the Government argues the effect of this court's decision upon the prior appeal (Nos. 14329 and 14331). Thus the petition reviews the complaint (Gov. Pet. 2-3), asserts there is an intra-circuit conflict (Gov. Pet. 6, 10, 13

and 14) and repeatedly argues that some aspect of those decisions is a determination of Washington law binding upon the court here.

Those decisions were, of course, vacated.

The complaint is not even part of this record, having passed "out of the case" (R. 405) upon entry of the pre-trial order.

In seeking and obtaining a writ of certiorari on review of the prior decisions in this case, appellants argued at length that any purported determination of issue of proximate cause was erroneous. It was pointed out in the Supreme Court of the United States that:

> "The issue of proximate cause was not argued before or decided by the District Court. It was neither briefed nor argued before the court below." (App. Br. p. 48, Sup. Ct., No. 47, Oct. Term, 1956).

The Supreme Court thereupon held:

> "The record shows that the trial judge dismissed both complaints in their entirety solely on the basis of the *Dalehite* case. While the Court of Appeals relied on state law to uphold the dismissal of those allegations in the complaints which charged negligence for reasons other than the Forest Service's carelessness in controlling the fire, we cannot say that the court's interpretation of Washington law was wholly free from its erroneous acceptance of the statements in *Dalehite* about public firemen * * * We think it proper to vacate both judgments in their entirety so that the District Court may consider the complaints anew, in their present form or as they may be amended, wholly free to determine their sufficiency . . . " *Rayonier,*

*Inc. v. United States,* 352 U.S. 315, 320-321 (1957)

Upon remand, the cases proceeded to trial upon the complaints and pre-trial orders which superseded them—neither the District Court nor any party to the cases conceiving that the vacated decision of this court was a correct application of Washington law.

In summary, the Government's petition for rehearing relies almost entirely upon vacated decicions as do portions of the Fibreboard Petition (p. 17).

## II. *This court correctly held that "Proximate Cause" is not an arbitrary defense to liability for a negligently caused or guarded fire under Washington law.*

In at least three cases the Washington Supreme Court has affirmed recoveries for a fire loss where the fire crossed lands owned by others. *Prince v. Chehalis Sav. & Loan Ass'n,* 186 Wash. 372, 58 P(2d) 290 (1936), aff'd en banc. 186 Wash. 377, 61 P(2d) 1374, (a fire started in a garage, spread through an adjacent rooming house, then destroyed the plaintiff's home).

*Wood & Iverson, Inc. v. Northwest Lumber Co.,* 138 Wash. 203-204, 244 Pac. 712 (1926) ("The fire traversed some two miles of respondent's logging works, crossed some intervening green timber, and went into appellant's logging works, where the damage was done.") *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P(2d) 19 (1932).

III. *This court's decision properly applied applicable Washington law of Proximate Cause to the Findings of the trial court.*

Washington law holds a person liable for damages which flow in unbroken sequence from negligent conduct where some damages are foreseeable as a consequence of that misconduct even though the loss is greater than might have been anticipated and injures someone entirely unknown to the negligent actor.

Washington has specifically adopted the rule of the *Palsgraf* case that

> "The risk reasonably to be perceived defines the duty to be obeyed."

*Frazee v. Western Dairy Products,* 182 Wash. 578 586, 47 P(2d) 1037 (en banc 1935);

*Kennett v. Yates,* 41 Wn(2d) 558, 564, 250 P(2d) 962 (1952).

The trial judge's findings, quoted in this court's opinion, establish beyond question that the Government was negligent because its conduct created a risk of a great conflagration which might burn from Heckelville to the Pacific Ocean. Appellants here claim damages for portions of just such property destroyed in exactly that kind of a conflagration.

A. *The Findings of the court below establish proximate cause and any purported finding to the contrary is only an erroneous conclusion of law.*

Having found initial negligence in controlling the Heckelville fire and damages resulting from the escape of that fire, it necessarily follows that proxi-

mate cause as a matter of fact and law is established.

There was nothing remote or unforeseeable about the result of the Government's negligence. *Guerin v. Thompson,* 53 Wn(2d) 515, 335 P(2d) 36 (1959).[1]

**IV.** ***This court correctly held that PAW and Fibreboard had a non-delegable duty to control the fire.***

In *Babcock v. Seattle School District No.* 1, 168 Wash. 557, 560, 12 P(2d) 752 (1932) the court held:

> "Fire is a dangerous agency and ever since the judgment rendered by Lord Cockburn in the case of *Bower v. Peate,* L.R. 1 Q.B.D. 321, the doctrine has prevailed that one who contracts for work from which, in the natural course of events, consequences injurious to his neighbor may reasonably be anticipated, cannot escape liability in case of damage, unless reasonable means have been adopted to avoid the injury."

Entirely aside from its obligations as an occupant of forest lands, the PAW was obligated to fight fires occurring on its right of way by virtue of its license from the Government and terms of its purchase agreement. It would be anomolous indeed to hold that the PAW was relieved of any duty to afford fire protection to its right of way because the State of Washington had entered into the cooperative fire agreement with the Government when the PAW expressly agreed to furnish that protection by direct agreements with the United States. In short, PAW is necessarily liable for (1) failing to perform its primary duty and (2) the failure of the United States to do so.

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[1]The issue was negligence of the plaintiff which the court held was a proximate cause of the accident as a matter of law.

V. ***This court did not hold Fibreboard liable upon any new theory.***

Fibreboard at the trial and in the argument here and in its petition again urges that it had a right to rely upon the Government and had no right to take action which might interfere with the Government's activities.

Appellants argued and proved that Fibreboard had knowledge of the Heckelville fire prior to 1:00 p.m. on August 6, 1951 but released its men, although their employees could have walked to the fire in about half an hour. (Tr. 358, 545) and four men could have extinguished the fire by that time (Tr. 537).

On August 7, 1951 the fire escaped through and into Fibreboard slash (Tr. 4202, 2011-2012). At no time did Fibreboard take any action of its own to suppress or control the fire.

Considering the known danger, Fibreboard was required to know of the Government's failures and to remedy them. Even assuming that the Government had the primary duty and Fibreboard's duty was secondary only, it had an obligation to determine if the Government was performing its duty properly and to take proper measures itself if the Government failed or refused to do so. *Mills v. Orcas Power & Light Co., et al.,* 156 Wash. Dec. 808, 355 P(2d) 781 (1960).

The court's findings of negligence "during the initial period, August 6-10", (R. 189) in his memorandum opinion were "incorporated in these findings of fact to the same effect as though set forth in full herein." (R. 206) In addition, of course, the fire

burned onto Fibreboard lands on August 7, 1951 on which date even Fibreboard concedes the Government was found to be negligent. Fibreboard appears to urge that the fire did not reach its lands until after August 7, which is clearly contrary to the findings of fact. (Finding X, R. 210).

## CONCLUSION

This court properly found the law applicable to the findings of fact made by the court below.

The petitions for rehearing should be denied.

Respectfully submitted,

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